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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LEE ROY LYNCH, Defendant and Appellant.	D053727 (Super. Ct. No. SCD194246)

APPEAL from a judgment of the Superior Court of San Diego County, Theodore M. Weathers, Judge. Affirmed in part, conditionally reversed in part, remanded for hearing.

Russell S. Babcock for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III.B through III.H.

I.

INTRODUCTION

Defendant Lee Roy Lynch appeals from his conviction after a jury trial. The charges against Lynch relate to the shooting of Latoya Younger, who was Lynch's girlfriend at the time she was shot. A jury convicted Lynch of attempted murder, assault with a firearm, corporal injury on a cohabitant, negligently discharging a firearm, being a felon in possession of a firearm, and being a felon in possession of ammunition. The jury also found true the enhancement allegations that Lynch personally inflicted great bodily injury under circumstances involving domestic violence, and that he personally used a firearm.

On appeal, Lynch contends: (1) that the trial court erred in denying his motion to dismiss all of the counts, with the exception of the attempted murder charge, on statute of limitations grounds; (2) that the court abused its discretion in not dismissing all of the charges due to precharging delay; (3) that the court improperly admitted in evidence at trial Latoya Younger's testimony from the preliminary hearing; (4) that the court improperly admitted a number of statements that Latoya Younger made to others to the effect that her boyfriend had shot her; (5) that there is insufficient evidence to support Lynch's conviction for attempted murder; (6) that there is insufficient evidence to support the jury's finding that Lynch was involved in a domestic and/or dating relationship with Latoya Younger at the time of the shooting; (7) that the court erred in refusing to instruct the jury on the lesser included offense of attempted voluntary manslaughter; and (8) that the prosecutor engaged in prosecutorial misconduct by improperly shifting the burden of

proof to Lynch during closing argument by commenting on Lynch's failure to call certain witnesses.

The People acknowledge that, on its face, the charging document shows that counts 2 through 6 were not charged within the applicable statute of limitations. However, the People urge this court to remand the matter to the trial court for a hearing concerning whether the statute was tolled prior to the time the charges were filed. We agree that remand is appropriate in this case so that the trial court can determine whether the statute of limitations had run on all of the charges except the attempted murder count by the time Lynch was charged, or instead, whether the statute was tolled.

We address the other claims that Lynch raises on appeal because some of the claims involve the attempted murder count, which is not affected by his statute of limitations argument, and because these issues will have to be resolved if the trial court determines that the statute of limitations had not run, and that the judgment of conviction on counts 2 through 6 stands. We reject these other contentions, and remand the matter to the trial court for the limited purpose of holding a hearing to determine whether Lynch's prosecution on counts 2 through 6 was time-barred.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution's case*

At around midnight on December 9, 2001, San Diego Police Sergeant Andrew Fellows responded to a report of a shooting at an apartment on Market Street in

San Diego. When Fellows arrived at the apartment, he found Latoya Younger[1] lying on the couch, bleeding from what appeared to be a gunshot wound to the chest. Paramedics arrived at the scene a few minutes later. Fellows rode in the ambulance to the hospital with Younger. During the ambulance ride, Younger told Fellows that Lynch had pulled a gun out of a black backpack and shot her.

Another officer searched the apartment and found a black backpack. Inside the backpack, he found women's clothing, a single .22-caliber bullet, a checking deposit receipt with Lynch's name on it, and a brown case. The brown case contained 60 grams of cocaine base.

Dr. Scott Ellner, a trauma surgeon at UCSD Medical Center, treated Younger when she arrived at the hospital. According to Dr. Ellner, Younger's injury was life-threatening. The bullet entered Younger's body just above her left clavicle and cut through a major artery. Dr. Ellner estimated that if Younger's wound had not been treated, she would have bled to death in under an hour. As part of his assessment of Younger's level of consciousness, Dr. Ellner asked Younger whether she remembered her name and what had happened to her. Younger told Dr. Ellner that she had been shot by her boyfriend.

Doctors at the hospital performed surgery on Younger to repair her damaged artery. Younger remained in the hospital for approximately 16 days after the surgery.

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1 After the shooting, Younger married Lynch and now goes by the name Latoya Lynch. For purposes of clarity, we refer to the victim as Younger throughout this opinion.

On the afternoon of December 10, San Diego Police Detective Ronald Snow interviewed Younger in the hospital. Younger appeared to be alert and coherent during the interview. Younger told Snow that she had been "homeless in a sense" but that she had been staying in the apartment where she was shot "on and off with her boyfriend [Lynch]." Lynch had been in and out of the apartment on the day of the shooting, and had left the apartment approximately an hour before the shooting. He returned about 50 minutes later. Younger was upset that Lynch had been gone and wanted to know where he had been. Younger and Lynch began to argue while Younger was in the living room with her cousin, Darnella Brown, and Lynch was in the dining room. As Lynch and Younger argued, Lynch pulled a gun out of a black backpack, pointed it at Younger, and shot at her. Younger ran to the bathroom and locked herself inside. At first Younger did not realize that she had been shot, but then she saw blood "everywhere."

Younger told Snow that she and Lynch both used the black backpack, but that she had never seen the gun before. Younger said that she did not know that Lynch had a gun. Snow attempted to locate Lynch after the shooting but was unsuccessful.

At the time of the incident, Younger's brother, Jerry Pradd, Jr., was in the apartment, sleeping in his room upstairs. Pradd heard a gunshot and then heard Younger scream that she had been shot. Pradd called 911. After calling 911, Pradd went downstairs, where he saw Younger lying on the couch.

Detective Snow interviewed Pradd on January 9, 2002. Pradd told Snow that on the day of the shooting, Pradd heard Darnella scream, "Oh, my God, you've been shot."

When Pradd ran downstairs, Younger told him that Lynch had shot her. Pradd also told Detective Snow that Lynch occasionally stayed at the apartment with Younger.

In 2002, Younger and Lynch married. They have two children together.

Younger did not testify at trial. However, she did testify at the preliminary hearing, and that testimony was read to the jury at trial. Younger said that she and Lynch had been "dating or in a romantic relationship" for eight years before they married in 2002. They had lived together before they were married, and sometimes stayed with Younger's father and brother in the apartment where Younger was shot.

According to Younger, a number of people had been hanging around the apartment complex on the day and/or evening of the shooting. Younger had been in and out of the apartment, and she and Lynch saw each other "here and there." Younger had been drinking that day. Younger denied that she had gotten into an argument with Lynch on the night of the shooting, and said that the only thing she remembered was "waking up at the hospital about two days later." The last thing she remembered before waking up in the hospital was "drinking."[2] Younger denied having told Detective Snow that Lynch had shot her. During her testimony at the preliminary hearing, Younger claimed that she did not know who had shot her.

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2 The parties stipulated that just after the shooting, Younger's urine tested positive for marijuana and negative for any other drugs, and that her blood alcohol content was .11 percent.

2. *The defense*

Lynch testified that he and Younger were married in 2003 and have two children together. According to Lynch, he and Younger lived in San Diego and then in Winslow, Arizona after they married.

Lynch stated that in 2001, Younger was a prostitute whom he paid to have sex with him. According to Lynch, he and Younger were not dating at that time, and he never stayed in Younger's parents' apartment. Lynch said that he would sometimes give Younger money to pay his union dues for him. The receipt that was found in the backpack was a receipt for Lynch's union dues.

Lynch recognized the black backpack as one that Younger often took with her. He claimed that he had never had possession of the backpack, and said that he had never put a gun in it. Lynch testified that he had not shot Younger. Lynch denied having been in the apartment on the day of the shooting, and said that he was in Jasper, Texas, when he first heard that Younger had been shot. Lynch claimed that he had taken Greyhound buses to Texas.

Lynch stated that after he returned to San Diego, he went with Younger's mother, Evonne Pradd, to visit Younger in the hospital. Lynch and Younger became closer while she was in the hospital, and she indicated to him that she wanted to move away from San Diego. After Younger was released from the hospital, Lynch and Younger lived together in San Diego for a few months and then moved to Winslow, Arizona. After approximately a year and a half, Younger and Lynch moved back to San Diego.

Lynch maintained that Younger had told him that she had been shot in a drive-by shooting.

B. *Procedural background*

By information filed May 8, 2006, Lynch was charged with attempted murder (Pen. Code,[3] §§ 664 and 187, subd. (a) (count 1)); assault with a firearm (§ 245, subd. (a)(2) (count 2)); corporal injury upon a cohabitant (§ 273.5, subd. (a) (count 3)); discharging a firearm in a grossly negligent manner (§ 246.3 (count 4)); being a felon in possession of a firearm (§ 12021, subd. (a)(1) (count 5); and being a felon in possession of ammunition (§ 12316, subd. (b)(1) (count 6)). The information also alleged that Lynch personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) with respect to counts 1, 3, and 4, and that Lynch personally used a firearm (§ 12022.5, subd. (a)(1) in connection with counts 1, 2, and 3.

Trial began on June 1, 2007. On June 7, the jury returned verdicts convicting Lynch on all counts and also returned true findings on the enhancement allegations.

Lynch was appointed new counsel on July 6. His attorney filed a motion for new trial, which the trial court heard and denied on August 1.

The court sentenced Lynch on September 10, 2008, to a total term of 17 years in prison. Lynch filed timely notices of appeal on September 10 and September 18.[4]

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3 Further statutory references are to the Penal Code unless otherwise specified.

4 It appears that Lynch's attorney filed one notice of appeal on September 10, 2007, and that Lynch filed his own notice of appeal on September 18, 2007.

III.

DISCUSSION

A. *The case must be remanded to the trial court for a determination as to whether the statute of limitations was tolled*

Lynch contends that his convictions on counts 2 through 6 are barred by the statute of limitations. In response, the People acknowledge that on its face, the charging document appears to establish that counts 2 through 6 were not charged within the applicable statute of limitations. However, the People argue that because Lynch failed to raise the statute of limitations either before or during the trial, the matter should be remanded to the trial court for a determination as to whether the statute may have been tolled, for two possible reasons—i.e., because Lynch was out of the state for some part of that time and/or because an arrest warrant was issued within the limitations period.

1. *Additional background*

The information alleged that Lynch committed the offenses on December 8, 2001. The information was filed May 8, 2006, which is approximately four years five months after the date of the offenses. The information does not include any tolling allegations, or any other allegations that would explain the delay in filing the charges.

Lynch did not raise a statute of limitations challenge to any of the counts against him either before or during trial.

At trial, Lynch testified that he and Younger lived in Arizona for some period of time between the 2001 offenses and the date on which he was charged with the offenses.

The record is unclear, however, as to the actual dates that Lynch resided outside of California.

After trial, Lynch obtained new counsel. Lynch then filed a motion for new trial, arguing (1) that the trial court erred in admitting in evidence statements that Younger made to other persons just after the shooting; (2) that there was newly discovered evidence in the form of witnesses who could testify that Lynch was in transit to Texas at the time of the shooting; and (3) that Lynch's trial counsel provided ineffective assistance. At the hearing on the motion for new trial, the trial court was also prepared to hear argument pertaining to Lynch's claim that his case should be dismissed on speedy trial grounds. In response to the trial court's inquiry as to whether Lynch's counsel "wish[ed] to argue [the speedy trial motion] today," counsel stated:

> "Your Honor, I think we could. Before we get there, the defense would respectfully make a motion sua sponte for arrest of judgment pursuant to Penal Code section 1185 vis-à-vis charges 2, 3, 4, 5, 6. I think that's all of them.
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> "The basis of the motion, Your Honor, is that, in going back through all this yet again, it appears that the complaint and/or -- well, the complaint was filed about -- well over three years beyond the statute of limitations with respect to those counts, counts 2, 3, 4, 5, 6. I think the statute pursuant to Penal Code section 800 and 801 indicates that since these offenses carried terms of less than eight years, the statute would have been three years -- statute of limitations for those offenses would have been three years.
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> "And the offense occurred December 8, 2001. The complaint was filed, my record indicates, May of 2006. So, in excess of the statute of limitations. And that's a jurisdictional defect which can be raised pursuant to an 1185 motion. Not that it necessarily has any practical effect that I can see at this moment, but nonetheless, I think those should be dismissed based upon those circumstances."

The prosecutor responded:

> "Your Honor, this is the first that I have heard of a jurisdictional claim pursuant to 1185. I believe it's actually a notice[d] motion. I believe there's a waiver of jurisdiction if it's not brought. I would ask the court to deny it. [¶] I also believe that, in terms of the filing of the complaint, the tolling actually occurs if there's a warrant, and the warrant was in the system for quite some time. But I believe this issue has been waived. I believe it's a notice[d] motion issue, and the court should not address it at this time. If it's inclined to entertain it -- because I have had absolutely no notice of this issue."

The trial court denied the motion, stating, "All right. At this time, the court is denying the motion pursuant to Penal Code section 1185. [¶] Okay." Defense counsel then replied, "Your Honor, just so the record's clear, that defect or challenge—challenge based upon the statute of limitations is jurisdictional. It can be waived by a defendant who expressly waives it and pleads guilty, but if he did not—and, obviously, Mr. Lynch did not in this case—then it can even be raised for the first time on appeal. So to the extent that that matters, I want to bring that to the court's attention." The court thanked defense counsel and then inquired about defense counsel's argument on the speedy trial issue.

Lynch did not raise the statute of limitations issue again in the trial court.

2. *Analysis*

The People essentially concede that, on its face, the information indicates that counts 2 through 6 were time-barred because the information was not filed within three years of the commission of those offenses. Section 801 provides that, with certain exceptions, "prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense." For purposes of

the statute of limitations, a felony prosecution commences when either "[a]n indictment or information is filed," "[a] complaint is filed charging a misdemeanor or infraction," "[t]he defendant is arraigned on a complaint that charges the defendant with a felony," or "[a]n arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint." (§ 804.) Under section 803, subdivision (d), the statute of limitations may be tolled "up to a maximum of three years during which the defendant is not within the state."

As the Supreme Court affirmed in *People v. Williams* (1999) 21 Cal.4th 335 (*Williams*), "when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time," including on appeal. (*Id*. at p 341.) Like the charges in counts 2 through 6 of the information filed in this case, the information in *Williams* indicated, on its face, that the action was time-barred. The information in *Williams*, which was filed on April 7, 1995, charged the defendant with an offense committed " '[o]n or about February 10, 1992.' " (*Id*. at p. 338.) "The information contained no additional allegations relevant to whether the statute of limitations barred the action." (*Ibid*.) The defendant waived jury trial, and the court eventually found him guilty and sentenced him to three years in prison. (*Ibid*.)

The *Williams* court described the appellate history of that case as follows:

> "On appeal, defendant argued for the first time that the prosecution was time-barred because the information alleged that he committed the offense more than three years before it was filed, and it contained no other facts or tolling allegations that would make the prosecution timely. The Attorney General argued that defendant was too late in

> asserting the statute of limitations. In addition, citing information outside the appellate record, he claimed that the prosecution was timely because an arrest warrant had issued on January 31, 1995, within the statutory time limit, and delayed discovery tolled the statute of limitations. Citing [*People v.*] *Chadd* [(1981)] 28 Cal.3d [739] at page 758, he urged that at least the prosecution should be allowed to amend the information on remand. The Court of Appeal remanded the matter for a hearing on whether the action was timely. Apparently because defendant had waived a jury trial, it ordered the court to make the determination. It concluded, 'If the trial court finds the statute of limitations had run, the court is instructed to vacate the judgment. If the trial court finds the statute of limitations had not yet run, the judgment of conviction shall stand.' " (*Williams*, *supra*, 21 Cal.4th at p. 338.)

As in *Williams*, the information in this case was filed more than three years after the date on which it alleged Lynch committed the charged offenses. Thus, on the face of the information, the prosecution of counts 2 through 6 was untimely.[5] However, Lynch did not raise the statute of limitations issue until months after his trial had concluded and he had been convicted. When Lynch finally did raise the statute of limitations issue, the prosecutor raised at least one potential fact that was not alleged in the information which, if true, might make the prosecution of these counts timely—i.e., that an arrest warrant may have been filed within the three-year limitations period, thus timely commencing the action. On appeal, the People also raise the possibility that the limitations period may have been tolled for some period of time while Lynch was residing outside of California.

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[5] Lynch does not challenge the timeliness of his prosecution on count 1, the attempted murder count, essentially conceding that the prosecution on that count was timely. (See § 800 [prosecution for offenses punishable by prison terms of eight years or more must be commenced within six years of the offense].)

Because of the state of this record on appeal, we find ourselves "unable to determine from the appellate record whether the action" against Lynch "was, in fact, time-barred." (*Williams*, *supra*, 21 Cal.4th at p. 339.)

The *Williams* court advised, "If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*Williams*, *supra*, 21 Cal.4th at p. 341, fn. omitted.) The *Williams* court went on to state that, "if on remand, the trial court determines the action is not time-barred, the conviction will stand despite the prosecution's error in filing an information that appeared time-barred . . . ." (*Id*. at p. 346.) The court explained:

> "Justice Brown's opinion in *Cowan* [*v. Superior Court* (1996) 14 Cal.4th 367] argued that 'Since [*People v.*] *McGee* [(1934) 1 Cal.2d 611] was decided, the determination of whether the statute of limitations applies in a given case has become an extraordinarily complex and time-consuming task, often requiring both factual development and the resolution of difficult legal issues,' and '[g]iven the complexities of our modern criminal statutes of limitations, without an adequate record, the trial court cannot properly assess issues arising under the statutes, and meaningful appellate review is virtually impossible.' (*Cowan*, *supra*, 14 Cal. 4th at pp. 387, 388 (conc. & dis. opn. of Brown, J.).) We agree on the need for an adequate record. The record here is utterly inadequate. No reviewing court can meaningfully assess whether the statute of limitations had expired or whether counsel was ineffective for not raising the issue. Either an express waiver of the statute of limitations or a charging document that contains allegations making the action timely would aid the reviewing court's task immensely." (*Williams*, *supra*, 21 Cal.4th at p. 344.)

Lynch maintains that remand is not appropriate in this case. Specifically, Lynch contends that his convictions on counts 2 through 6 should be dismissed because the reasoning of *Williams* does not apply in this case. Lynch distinguishes *Williams* on the

ground that the defendant in *Williams* never raised the statute of limitations issue prior to his appeal. According to Lynch, because Lynch raised the statute of limitations issue in his motion for new trial, he raised it "in the trial court," and the "matter was fully adjudicated." Lynch further contends that the remedy in *Williams* is expressly limited to cases in which the defendant never asserted the statute of limitations in the trial court, noting that the *Williams* court stated in a footnote: "This case presents no issue regarding the rules to apply when the defendant does assert the statute of limitations at trial. A variety of issues may arise in many different factual contexts. We leave these questions to future courts." (*Williams*, *supra*, 21 Cal.4th at p. 345, fn. 3.)

In making this argument, Lynch fails to appreciate the distinction between raising an issue at or before *trial* and raising an issue in the *trial court*. What occurred in this case demonstrates the significance of this distinction. Although Lynch did initially raise the statute of limitations issue with the trial court and not, as in *Williams*, on appeal, Lynch did not raise the issue *prior to or during trial*, when the trial court could have more readily held a hearing on the matter (pretrial), or submitted any factual issues to the jury (during trial). Rather, Lynch raised the issue in a motion for new trial, *after* his trial had concluded and he had been convicted. The specific question that the *Williams* court was considering was "whether 'the statute of limitations in a criminal case is an affirmative defense which is forfeited if not raised *before or during trial*.' " (*Williams*, *supra*, 21 Cal.4th at p. 339, italics added.) Lynch is thus in the same position as the defendant in *Williams* since, like the defendant is *Williams*, Lynch did not raise the statute of limitations issue "before or during trial."

Lynch's argument that this court should conclude that the People have forfeited the opportunity to litigate the "factual issues" related to the statute of limitations, such as tolling, because the People failed to litigate those issues in the trial court, is similarly flawed. In making this argument, Lynch relies on the following language in *Williams*:

> "[T]he problem here is limited to those cases in which the prosecution files a charging document that, on its face, indicates the offense is time-barred. '[W]here the pleading of the state *shows that the period of the statute of limitations has run*, and nothing is alleged to take the case out of the statute, for example, that the defendant has been absent from the state, the power to proceed in the case is gone.' ([*People v.*] *McGee* [1934] 1 Cal.2d [611,] 613-614, italics added.) *McGee* does not apply to an information that, as it should, either shows that the offense was committed within the time period or contains tolling allegations. *Although, under our cases, defendants may not forfeit the statute of limitations if it has expired as a matter of law, they may certainly lose the ability to litigate factual issues such as questions of tolling*." (*Williams, supra,* 21 Cal.4th at p. 344, italics added.)

According to Lynch, if a defendant may "lose the ability to litigate factual issues such as questions of tolling," then the prosecution should also face the possibility of losing the ability to litigate such factual issues. Lynch urges that we apply this standard to the prosecution here, so as not to permit the People to present additional facts on remand concerning possible tolling of the statute of limitations. However, because of the time and manner in which Lynch raised the statute of limitations challenge in the trial court (i.e., *after* trial, and by way of an unnoticed oral motion at a hearing on another matter), the prosecution cannot be deemed to have forfeited its opportunity to litigate the tolling issues.

In this case, *both* parties are partly to blame for the fact that Lynch was tried on, and convicted of, potentially time-barred counts. Where a prosecutor files an information that, on its face, contains charges that appear to be time-barred, and the record does not establish otherwise, at least in part because the defendant failed to raise the issue before or during trial, "the fairest solution is to remand the matter to determine whether the action is, in fact, timely." (*Williams, supra*, 21 Cal.4th at p. 345.)[6]

Lynch concludes that "[a] remand will not reveal evidence that the government timely filed an arrest warrant because the record proves that the first charging document was the information that the prosecution filed on May 8, 2006, five years after the offense." It is unclear why Lynch believes that the record "proves" that the information was the first charging document. Although the information is the first charging document that is contained in the record on appeal, the transcript of the posttrial hearing indicates that an arrest warrant may have been issued prior to the filing of the information. Thus,

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6 The *Williams* court noted that both parties bear some responsibility for the problems that arise from a late-raised statute of limitations challenge to a charging document that appears, on its face, to be untimely:

> "[T]he prosecutor has full control over the charging document. Here, the district attorney could easily have alleged in the information either that an arrest warrant issued before the time period had expired, or that the action was filed timely after discovery of the crime, or both (assuming either allegation is factually supported). The silent record is partly the defendant's fault for not raising the issue at trial. It was, however, the prosecution's fault in the first instance for filing an information that, on its face, was untimely. In that situation, the fairest solution is to remand the matter to determine whether the action is, in fact, timely." (*Williams, supra*, 21 Cal.4th at p. 345.)

the record does not "prove" anything with respect to when the prosecution of this case actually commenced. Rather, the record here—like the record that was available to the *Williams* court—is simply insufficient to allow this court to make any final determination as to the timeliness of the prosecution of counts 2 through 6.

The appropriate step at this point is thus to remand the case to the trial court for further proceedings to determine whether counts 2 through 6 were or were not prosecuted within the statute of limitations. (See *People v. Terry* (2005) 127 Cal.App.4th 750, 774 [following *Williams*' directive to remand for a hearing if the court cannot determine from the available record whether the action is timely: "The proper step at this juncture is to remand for a hearing to determine whether counts four through nine were time-barred"].)

Although it is clear that it is appropriate in this instance to remand the matter to the trial court for further proceedings, we have found no case that specifically addresses whether any underlying factual issues relating to the statute of limitations are to be determined by the court, or instead, by a jury, on remand.[7] In *People v. Zamora* (1976) 18 Cal.3d 538, 563, fn. 25 (*Zamora*), the Supreme Court held that although a trial court may hold a preliminary hearing to attempt to decide statute of limitations issues as a

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[7] At oral argument, we asked the parties what procedure should be followed on remand if this court were to conclude that remand is appropriate under *Williams*. After oral argument, we requested that the parties submit supplemental briefing addressing the following question: "On remand, if the trial court cannot determine, as a matter of law, that an arrest warrant meeting the requirements of Penal Code section 804 was issued within the relevant limitations period, what would be the appropriate procedure for determining any remaining statute of limitations tolling issues?"

We have considered both parties' letter briefs in reaching our conclusion.

matter of law, if the court cannot make a determination as a matter of law, questions concerning the statute of limitations are to go to the jury. However, more recent Supreme Court decisions place the continued viability of *Zamora* in question. (See *People v. Posey* (2004) 32 Cal.4th 193, 215 (*Posey*) [determining that venue is a question of law for the court to determine, overruling previous authority that venue is a question of fact for the jury]; *People v. Betts* (2005) 34 Cal.4th 1039, 1054 [territorial jurisdiction is a procedural matter, and the Constitution does not require a jury trial on factual questions relating to jurisdiction].) As the Supreme Court said in *Posey*, "[A]lthough questions of fact relating to the substantive issue of guilt or innocence are within the province of the jury, questions of law concerning procedural issues that do not themselves determine guilt or innocence—including any underlying questions of fact—are within the province of the court. [Citation.]" (*Posey*, *supra*, 32 Cal.4th at p. 208.)

Whether an action is time-barred under the applicable statute of limitations does not involve a "substantive issue of guilt or innocence." However, since no case has expressly overruled *Zamora*, we presume that *Zamora* remains good law and that a defendant who raises a statute of limitations question before or during trial has the right to have a jury decide underlying factual questions pertaining to whether the action is timely.

The *Williams* court did not address the question whether a defendant who does not raise a statute of limitations issue until *after* conviction is entitled to have a jury decide underlying factual questions that go to the timeliness of the action, however, because the

defendant in *Williams* had waived his right to a jury trial.[8] (*Williams, supra*, 21 Cal.4th at p. 338.) However, the holding in *Williams* pertaining to the procedure to be followed on remand is not based on the fact that the defendant in that case waived jury trial, and the court did not limit the procedure to be followed on remand to cases in which the defendant *has* waived jury trial:

> "Because the defendant in *Cowan* wanted to waive the statute of limitations expressly, we did not decide whether to overrule the prior cases' holdings and 'hold that the statute of limitations in criminal cases is an affirmative defense, which is forfeited if a defendant fails to raise it before or at trial.' (*Cowan* [*v. Superior Court* (1996) 14 Cal.4th 367, 374].) . . . The question is presented here. We now conclude that when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. *If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing*." (*Williams, supra*, 21 Cal.4th at pp. 340-341, italics added, fn. omitted.)

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[8] Again, the *Williams* court described the relevant portion of the procedural background of the case as follows: "On appeal, defendant argued for the first time that the prosecution was time-barred because the information alleged that he committed the offense more than three years before it was filed, and it contained no other facts or tolling allegations that would make the prosecution timely. The Attorney General argued that defendant was too late in asserting the statute of limitations. In addition, citing information outside the appellate record, he claimed that the prosecution was timely because an arrest warrant had issued on January 31, 1995, within the statutory time limit, and delayed discovery tolled the statute of limitations. Citing *Chadd*, *supra*, 28 Cal.3d at page 758, he urged that at least the prosecution should be allowed to amend the information on remand. The Court of Appeal remanded the matter for a hearing on whether the action was timely. *Apparently because defendant had waived a jury trial, it ordered the court to make the determination*. It concluded, 'If the trial court finds the statute of limitations had run, the court is instructed to vacate the judgment. If the trial court finds the statute of limitations had not yet run, the judgment of conviction shall stand.' " (*Williams, supra*, 21 Cal.4th at p. 338, italics added.)

There is nothing in this language that suggests that statute of limitations questions must be submitted to a jury if the defendant does not raise the statute of limitations issue until after he has been convicted of the offense, or that remand for a court hearing should occur only when the defendant has waived his right to jury trial. Rather, the *Williams* court appears to have provided guidance as to what appellate and trial courts should do in *any* situation in which the charging document is untimely on its face, but the defendant fails to raise the issue until after trial.[9]

We conclude that *Williams* requires remand for the *trial court* to determine whether counts 2 through 6 were prosecuted within the statute of limitations.

B. *The trial court did not abuse its discretion in denying Lynch's motion to dismiss on the ground of excessive precharging delay*

Lynch contends that the trial court abused its discretion in denying his pretrial motion to dismiss based on precharging delay.

1. *Additional background*

Before trial, Lynch moved to dismiss the case on the ground that he had been prejudiced by the four-and-a-half year delay between the date of the shooting and the date that charges were filed against him. The court deferred ruling on the motion until after trial.

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9 The appellate court in *Terry*, *supra*, 127 Cal.App.4th at page 774, also appears to have interpreted *Williams* to hold that the trial court, not a jury, is to determine statute of limitations issues on remand. The *Terry* court remanded "for a hearing to determine whether counts four through nine were time-barred"—with no mention of presenting these questions to a jury.

Lynch filed a motion for a new trial. On August 1, 2008, the court held a hearing on Lynch's motion, and also heard argument pertaining to Lynch's motion to dismiss on speedy trial grounds.[10] After Lynch proffered the testimony of several witnesses in support of his motion for a new trial,[11] the court found that the witnesses had demonstrated that they had clear memories of the day of the shooting, and that the defense could have called them as witnesses at trial. The court concluded that Lynch had therefore not been prejudiced by the delay in bringing the case to trial. Specifically, the court stated: "The motion for the new trial also brought up the fact that there were other witnesses [apart from Younger], all of whom had great memories about different events. At least they claimed to have great memories of taking Mr. Lynch to the bus station on the day of the shooting, taking him to [the] Greyhound bus station. They knew exactly. And all of these witnesses, quite frankly, were witnesses that the defendant could have called at the trial, had he wanted to." The court determined that Lynch had not

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10 In his motion to dismiss, Lynch asserted that the delay between the shooting and his being charged violated his state and federal rights to a speedy trial. Lynch makes the same assertion on appeal. However, Lynch is not complaining about a delay between his arrest and/or the filing of a charging document and his trial; rather, Lynch complains about the delay between the time the offenses were committed and the time the state charged him with the offenses, i.e., the precharging delay. Precharging delay does not implicate a defendant's speedy trial rights. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250 (*Nelson*).) Lynch's argument that the trial court failed to "engage in the balancing test required by *Barker v. Wingo* [(1972) 407 U.S. 514]," a case involving a speedy trial challenge, is therefore misplaced.

11 One of Lynch's arguments was that there was newly obtained evidence in the form of witness testimony that would establish that Lynch was not in San Diego at the time of the shooting.

demonstrated any prejudice as a result of the delay in charging him, and denied the motion to dismiss.

2. *Analysis*

"Although precharging delay does not implicate speedy trial rights, a defendant is not without recourse if the delay is unjustified and prejudicial. '[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' [Citation.]" (*Nelson*, *supra*, 43 Cal.4th at p. 1250.) "Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.' [Citation.]" (*Ibid*.)

The trial court determined that Lynch was not prejudiced by the delay between December 8, 2001, the date of the shooting, and May 8, 2006, the date on which Lynch was charged in this case. Lynch suggests that the trial court "failed to consider memory problems which would occur as a result of the time delay and problems that appellant would have [in] corroborating his alibi . . . documents." He also suggests that prejudice may be presumed from the mere fact of a five-year delay. However, there is substantial evidence to support the trial court's finding that Lynch was not prejudiced by the delay.

(See *People v. Mitchell* (1972) 8 Cal.3d 164, 167 [question whether delay required dismissal of charges was factual and trial court's determination was supported by substantial evidence].) Various witnesses whom the defense identified in its motion for a new trial said that they had "great memories about different events," and seemed to remember taking Lynch to the bus station or having been aware that Lynch was not in San Diego on the day of the shooting. As the trial court stated, there is nothing that indicates that Lynch could not have called these witnesses at trial. Lynch did not demonstrate that these witnesses were unavailable because of the delay, or that their memories had failed, or that any other evidence had been lost.

We conclude that Lynch has not demonstrated that the trial court abused its discretion in denying his motion to dismiss on the ground of precharging delay.

C. *The trial court did not err in admitting Younger's preliminary hearing testimony*

Lynch contends that the trial court erred in admitting Younger's preliminary hearing testimony at trial. According to Lynch, the admission of Younger's preliminary hearing testimony violated his right to confront witnesses, as expressed in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

Just before the trial began, an investigator from the prosecutor's office testified that he had attempted to locate Younger and serve her with a subpoena, but his efforts had been unsuccessful. After hearing from the investigator, the trial court concluded that the prosecution had made reasonable efforts to contact Younger, and that Younger should be considered "unavailable as a witness" under Evidence Code section 240, subdivision

(a)(5),[12] such that the prosecution would be permitted to present Younger's prior testimony from the preliminary hearing at trial.

During the prosecution's case-in-chief, Younger's preliminary hearing testimony was read to the jury. In that testimony, Younger claimed that she could not remember what had happened to her on the night she was shot. Younger stated that the only thing she remembered was "waking up at the hospital about two days later." Younger also denied having told Detective Snow, or any other police officer, that Lynch had shot her. Younger stated, "I don't know who shot me. I'm not going to say he shot me. I don't know who shot me. Anybody could have did it [*sic*]." Younger also testified that she married Lynch in 2002, and that she and Lynch had "been dating or in a romantic relationship" for about eight years prior to marrying.

" 'The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const.[,] art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination.' " (*People v. Bunyard* (2009) 45 Cal.4th 836, 848-849 (*Bunyard*), citing *People v. Cromer* (2001) 24 Cal.4th 889, 892 and *Crawford*, *supra*, 541 U.S. at pp. 53–54.) " 'In California, the

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12 Evidence Code section 240 provides in pertinent part that " 'unavailable as a witness' means that the declarant is any of the following: [¶] . . . [¶] (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

exception to the confrontation right for prior recorded testimony is codified in [Evidence Code] section 1291, subdivision (a), which provides: "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." A witness is unavailable if "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." ([Evid. Code,] § 240, subd. (a)(5).)' [Citation.]" (*Bunyard, supra,* at p. 849.)

The trial court determined that Younger was unavailable to testify at trial. Accordingly, the prosecution was permitted to introduce Younger's preliminary hearing testimony, in which she claimed that she did not know who shot her. Lynch does not challenge the trial court's finding that Younger was unavailable to testify at trial. Rather, Lynch contends that the trial court should have excluded Younger's preliminary hearing testimony under Evidence Code section 1291 because, when cross-examining Younger during the preliminary hearing, his interest and motive were not similar to his interest and motive at trial. He asserts that "[t]he defense cross-examination of Younger during the preliminary hearing was terse," and that if "defense counsel had anticipated that Ms. Younger would have been unavailable at trial, he could have examined her much more extensively regarding her relationship with her 'baby-daddy' [i.e., a different man] and her motive to falsely implicate [Lynch]." Lynch also claims that it is unclear whether, at the

time of the preliminary hearing, defense counsel had been provided with all of the statements that Younger had made to other individuals to the effect that Lynch had shot her, and it was thus unclear whether Lynch had had an opportunity to question Younger about those statements.

We reject Lynch's contention that his motives were different at the two proceedings, and that as a result, defense counsel's cross-examination of Younger at the preliminary hearing was "terse" and counsel failed to engage in more "extensive[]" cross-examination regarding Younger's relationship with another man. At both the preliminary hearing and trial, Lynch was attempting to demonstrate the lack of evidence that he was the person who shot Younger. Even if Lynch's interest in asking Younger certain questions at the preliminary hearing may not have been precisely the same as at the trial, this does not mean that his motives during the two proceedings differed in any material way.

Courts " 'have routinely allowed admission of the preliminary hearing testimony of an unavailable witness.' [Citation.] The . . . decision of *Crawford v. Washington* (2004) 541 U.S. 36 . . . , although changing the law of confrontation in some respects, left these principles intact." (*People v. Seijas* (2005) 36 Cal.4th 291, 303.)

" '[A] defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars.' [Citation.]" (*People v. Valencia* (2008) 43 Cal.4th 268, 293-294.) "The

' "motives need not be identical, only 'similar.' " ' [Citation.]" (*Id*. at p. 294.) " ' "Both the United States Supreme Court and this court have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony." ' [Citations.]" (*Ibid*.)

The fact that Lynch's counsel may not have asked Younger every question that he might have asked her at the preliminary hearing is not a reason to exclude her preliminary hearing testimony. "This argument can always be made, as one can always think of additional questions. . . . [I]t is the opportunity and motive to cross-examine that matters, not the actual cross-examination." (*People v. Smith* (2003) 30 Cal.4th 581, 611.) " 'As long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity.' [Citation.]" (*Id*. at pp. 611-612.)

Lynch had the opportunity to cross-examine Younger at the preliminary hearing.[13] The trial court therefore did not err in admitting Younger's preliminary hearing testimony at trial.

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13 To the extent that Lynch argues that Younger's preliminary hearing testimony should not have been admitted because it is not clear that at the time of the preliminary hearing, his attorney had "received a discovery of all the alleged statements that Ms. Younger had allegedly made to other people to the effect that appellant had shot her," this argument actually concerns whether these statements were admissible, *not* whether Younger's preliminary hearing testimony was admissible. We address the question of the admissibility of the statements that Younger made to other individuals in part D., *post*.

D. *The court did not commit reversible error with respect to the admission of Younger's hearsay statements to the effect that Lynch was the person who shot her*

Lynch challenges the admissibility of certain statements that Younger made to a number of individuals concerning who had shot her. Specifically, Lynch contends that the trial court erred in admitting statements that Younger made to Sergeant Fellows, to Younger's brother Jerry Pradd, Jr., to an emergency room physician, and to Detective Snow, to the effect that Lynch had shot her. According to Lynch, Younger's statements were hearsay, and "were simply admitted over defense objection," despite the fact that the prosecutor failed to "establish an adequate foundation for the admission of these statements under any . . . potentially applicable hearsay exceptions." Lynch further contends that the admission of these statements violated his confrontation rights under *Crawford*.

1. *Additional background concerning the statements at issue*

a. *Younger's statements to Sergeant Fellows while en route to hospital*

Sergeant Fellows testified that he rode in the ambulance with Younger on the way to the hospital and that he took a statement from her, in the event that she died. Fellows testified that during the ambulance ride, Younger was nervous and afraid that she was going to die. Defense counsel objected to the admission of Fellows's testimony regarding what Younger told him in the ambulance, on the ground that the statements were hearsay. The court overruled the objection. Fellows proceeded to testify that Younger told him that she had been with Lynch on the day of the shooting and that at one point, Lynch left

without telling her where he was going. When she called him on his cellular telephone, he told her that "he was handling his business, and he'd come back when he was done." When Lynch returned, he and Younger got into an argument. Lynch retrieved a gun from a backpack, turned around, and shot Younger from approximately 15 feet away.

b. *Younger's statements to the emergency room physician*

Dr. Ellner, the emergency room doctor who treated Younger upon her arrival at the hospital, was called as a prosecution witness at trial. Prior to questioning the doctor about statements that Younger made to him, the prosecutor requested a sidebar conference with the judge and defense counsel during which he informed the court and defense counsel that he intended to elicit Younger's statement to Dr. Ellner that Lynch had shot her. The prosecutor indicated that he anticipated that defense counsel might have an objection, and that was why he was informing the court of what he intended to ask the witness. When the court asked defense counsel to respond, defense counsel stated simply, "Objection," and gave no grounds. The court overruled the objection.

The prosecutor asked Dr. Ellner whether he had asked Younger "what had happened." Dr. Ellner replied that he asked Younger her name and whether she remembered what had happened to her. Dr. Ellner said that he asked Younger these questions in an attempt to ascertain her level of "neurologic consciousness" on the "Glasgow Coma Scale." As Dr. Ellner was about to say what Younger had said in response to his questions, defense counsel objected that the prosecutor's question called for hearsay. The court overruled the objection. Dr. Ellner then testified that Younger had told him, "I was shot by my boyfriend."

c. *Younger's statements to Detective Snow*

Detective Snow testified that when he interviewed Younger on December 10, 2001, she told him that Lynch was the person who had shot her. She also told Snow that Lynch had been staying at the apartment with her, off and on, and that they had gotten into an argument on the day of the shooting. Younger repeated to Detective Snow what she had told Sergeant Fellows about Lynch pulling a gun out of the black backpack and shooting her in the chest. Defense counsel did not object to the prosecutor's questions of Detective Snow concerning what Younger had told him until Snow began to discuss what Younger had said regarding what she heard her cousin, Darnella, yelling. The court sustained this objection, but permitted the prosecutor to elicit from Detective Snow the fact that Younger had indicated that she had heard Darnella yelling. The court did not allow Detective Snow to say what it was that Darnella had said.

d. *Pradd's statements to Detective Snow relating what Younger had told Pradd concerning who shot her*

Pradd, Younger's brother, testified at trial that Younger never told him who shot her. He also testified that Lynch had never stayed at the apartment. Detective Snow testified that Pradd had told him on January 9, 2002, that Younger said that Lynch had shot her as Pradd was running down the stairs after the shooting. Defense counsel objected to the prosecutor eliciting from Detective Snow Younger's statements to Pradd on the grounds that the prosecutor was leading the witness, and that the statements were hearsay. The trial court overruled the objections. Detective Snow also testified that

Pradd told the detective that Lynch had stayed at the apartment with Younger. Defense counsel did not object to the prosecutor eliciting this statement from Detective Snow.

2. *Applicable law*

a. *Hearsay determinations*

A trial court's ultimate determination that hearsay satisfies the statutory criteria for admissibility is reviewed for an abuse of discretion. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 787.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

In determining whether any error by the trial court in admitting hearsay evidence was prejudicial or caused a miscarriage of justice, we apply the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, at page 836, determining whether it is reasonably probable that the defendant would have obtained a more favorable result if the error had not occurred. (*People v. Duarte* (2000) 24 Cal.4th 603, 618-619.)

b. *Crawford v. Washington*

"In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court announced a new standard for determining when the confrontation clause of the Sixth Amendment prohibits the use of hearsay evidence—i.e., an out-of-court statement offered for its truth—against a criminal defendant." (*People v. Cage* (2007) 40 Cal.4th 965, 969 (*Cage*).) "*Crawford* held that this clause protects an accused against

hearsay uttered by one who spoke as a ' "witness[]" ' ' "bear[ing] testimony" ' (541 U.S. at p. 51) if the declarant neither takes the stand at trial nor was otherwise available for cross-examination by the accused." (*Cage*, *supra*, at p. 969.)

The United States Supreme Court did not define the term "testimonial" in a comprehensive way, but noted that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Crawford, supra,* 541 U.S. at p. 68.) In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Court provided this further explanation regarding when statements will and will not be deemed "testimonial": "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, fn. omitted.)

In *Cage, supra,* 40 Cal.4th 965, our Supreme Court deduced from *Crawford* and *Davis* some basic principles that courts should consider in determining whether hearsay statements are "testimonial" for confrontation purposes:

> "We derive several basic principles from *Davis*. First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be

> testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Id.* at p. 984, fns. omitted.)

c. *Preserving evidentiary objections*

The statute that governs the preservation of evidentiary objections for appeal provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The [reviewing] court . . . is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.) Thus, " 'questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]' [Citation.]" (*People v. Seijas* (2005) 36 Cal.4th 291, 301.)

The requirement of a specific trial objection to preserve a matter for appeal "is necessary in criminal cases because a 'contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal." ' [Citation.] . . . '[A] specifically grounded objection to a defined body of evidence . . . allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' [Citation.] [¶] Thus, the requirement of a specific objection serves important purposes.' " (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

3. *Analysis*

a. *Younger's hearsay statements to Sergeant Fellows and Detective Snow were admissible as prior inconsistent statements*

Lynch raised no hearsay objection to the introduction of Younger's statement to Detective Snow. Because Lynch did not make a hearsay objection to these statements at trial and has not argued that it would have been futile to make the objection, he has forfeited his claim that Younger's statements to Detective Snow constitute inadmissible hearsay. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1107 [defendant's failure to make hearsay objection in trial court resulted in forfeiture of claim]; see also *People v. Riggs* (2008) 44 Cal.4th 248, 317 [defendant did not object to prosecutor's question or answer, and it would not have been futile to do so; thus, defendant forfeited his claims, including hearsay claim].)

Even assuming that Lynch did not forfeit his hearsay challenge to Younger's statement to Detective Snow, that statement, and Younger's statement to Sergeant Fellows, were admissible as prior inconsistent statements. Evidence Code section 1235 provides that a witness's prior inconsistent statements may be introduced as substantive evidence, in addition to being admissible to impeach the witness. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4. That section provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Evid. Code, § 1235.) Evidence Code section 770 provides:

> "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> "(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
>
> "(b) The witness has not been excused from giving further testimony in the action."

Younger's preliminary hearing testimony was introduced at trial as her trial testimony because the court found that Younger was unavailable to testify. At the preliminary hearing, the prosecutor asked both Sergeant Fellows and Detective Snow about statements that Younger had made to them after the shooting incident. The prosecutor asked Sergeant Fellows what Younger had said about the incident as he rode with her in the ambulance. Fellows replied that Younger said she and Lynch "were arguing, and he went into the kitchen and recovered a gun from his backpack and shot her

once." At the same hearing, Detective Snow testified that when he interviewed Younger at the hospital, Younger identified Lynch "as the person who had shot her."

Younger was given the opportunity "to explain or to deny the statement[s]" (Evid. Code, § 770) during her testimony at the preliminary examination when the prosecutor asked Younger whether she had told Detective Snow or other police officers that Lynch was the person who shot her. Younger denied having told either of the officers that Lynch had shot her, and also said that she was unable to remember what had happened when she was shot or for two days following the shooting. Younger's statements to the officers identifying Lynch as the person who shot her—statements that were inconsistent with, and made prior to, her preliminary hearing testimony—were thus properly admitted both to impeach Younger, and for their truth, under Evidence Code sections 1235 and 770.

b. *Younger's hearsay statements to Sergeant Fellows and Detective Snow were not inadmissible under Crawford*

Lynch's complaint that the admission of the statements that Younger made to Sergeant Fellows and to Detective Snow violated his Sixth Amendment right to confront witnesses is meritless. As an initial matter, at trial, Lynch raised no confrontation clause objection nor mentioned *Crawford*, which was decided several years before the trial in this case. Lynch thus forfeited his claim that the admission of the statements at issue violated his confrontation rights. (See *People v. Chaney* (2007) 148 Cal.App.4th 772, 779 [raising of hearsay objection does not preserve Sixth Amendment claim, which is forfeited if not independently raised]; see also *People v. Sanders* (1995) 11 Cal.4th 475,

512, fn. 4 [timely objection required to assert claim that admission of evidence was erroneous under the Sixth Amendment.)[14]

Even if Lynch had not forfeited his *Crawford* claims by failing to make timely objections based on his confrontation rights, it is clear that the admission of Younger's hearsay statements to Sergeant Fellows and to Detective Snow did not implicate Lynch's right to confront witnesses, since Lynch had the opportunity to confront Younger about these statements during cross-examination at the preliminary hearing. The prosecutor asked Younger on direct examination at the preliminary hearing whether she had told the police officers that Lynch had shot her. Younger denied having made any statements to that effect. Lynch was thus aware of Younger's earlier statements to Sergeant Fellows and to Detective Snow, and had the opportunity to confront her about those statements at the preliminary hearing.

c. *Any error in admitting Younger's hearsay statements to Dr. Ellner or Pradd's hearsay statements to Detective Snow about what Younger said to Pradd, was harmless*

With respect to the statement that Dr. Ellner attributed to Younger during his testimony at trial, it does not appear that Younger was given the opportunity to explain or deny this statement during her preliminary hearing testimony. As a result, this statement constituted inadmissible hearsay, and the court thus erred in admitting it. As for Pradd's statement to Detective Snow to the effect that Younger had told Pradd that Lynch had

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14 The defendant in *Crawford* raised a timely objection that the admission of the nontestifying witness's statements "would violate his federal constitutional right to be 'confronted with the witnesses against him.'" (*Crawford, supra,* 541 U.S. at p. 40.)

shot her, this statement contains two levels of hearsay. Even if Pradd's statement to Detective Snow impeached Pradd's credibility, in that it involved a prior statement of Pradd's that was inconsistent with his trial testimony, the statement still contained inadmissible hearsay in the form of the statements that Pradd attributed to Younger.

Assuming that the court erred in admitting both Dr. Ellner's and Pradd's statements concerning what Younger had told them, we conclude that it is not reasonably probable that Lynch would have obtained a more favorable result if the trial court had not admitted either or both of these statements. (See *People v. Duarte* (2000) 24 Cal.4th 603, 618-619 [applying standard of harmless error review announced in *People v. Watson*, *supra*, 46 Cal.2d at p. 836].) The court properly admitted two other statements that Younger made, close in time to the shooting, in which she identified Lynch as the shooter. Although Younger testified at the preliminary hearing that she did not know who shot her, the jury clearly did not believe Younger's testimony, but instead, believed that Younger was being truthful when she told Sergeant Fellows and Detective Snow that Lynch had shot her. It is simply unreasonable to conclude that the jury would have believed Younger's preliminary hearing testimony, as opposed to her earlier statements that Lynch had shot her, if the jury had heard that Younger told Sergeant Fellows and Detective Snow just after the shooting that Lynch was the shooter, but had not heard the testimony concerning Younger's statements to Dr. Ellner and Pradd to the same effect.

d. *Lynch forfeited any confrontation clause claims regarding Younger's statements to Dr. Ellner and Pradd's statements to Detective Snow about what Younger said to Pradd; in any event, the admission of those statements did not violate Crawford*

As with the other hearsay statements that Lynch challenges on confrontation clause grounds on appeal, at trial he raised no *Crawford* objection with respect to the admission of Younger's hearsay statement to Dr. Ellner or Pradd's double hearsay statement to Detective Snow. Lynch has thus forfeited any claim that the admission of those statements violated his confrontation rights.

Regardless, these claims would fail on their merits. Younger's statements to Dr. Ellner in the emergency room were not "testimonial." Dr. Ellner asked Younger if she remembered what had happened to her, for the purpose of assessing and treating her medical condition. The statements were not elicited by the government or by a government agent, and it is clear that the doctor was not conducting a criminal investigation when he asked Younger what had happened. The admission of Younger's statement to Dr. Ellner in the emergency room to the effect that her boyfriend had shot her thus did not violate *Crawford* or the Sixth Amendment. (See *Cage*, *supra*, 40 Cal. 4th at pp. 970-971 ["statement made solely for purposes of medical treatment to a physician not affiliated with police or prosecutors has none of the characteristics the court has found significant" in determining whether statements are testimonial].)

The admission of Pradd's statement to Detective Snow that Younger had told Pradd that Lynch shot her also did not violate the confrontation clause. As to the first level of hearsay (i.e., Detective Snow testifying as to what Pradd had told him), Lynch

had an opportunity to cross-examine Pradd. With respect to the second level of hearsay (i.e. Pradd's recounting of Younger's statement to him that Lynch shot her), Younger's statement does not have the attributes of a testimonial statement within the meaning of *Crawford*. The statement at issue is one that Younger made immediately after she was shot. Younger's statement appears to be a spontaneous declaration, not a response to any structured questioning. The circumstances surrounding the statement clearly did not impart "the formality and solemnity characteristic of testimony." (*Cage*, *supra*, 40 Cal.4th at p. 984, fn. omitted.) Further, Pradd did not appear to have the purpose of establishing a fact for possible use in a criminal trial when he spoke with Younger, but, rather, seemed to be concerned with understanding what had just occurred so that he could provide Younger with assistance. Under these circumstances, we conclude that Younger's statements to Pradd immediately after the shooting were not "testimonial."

E. *There is substantial evidence to support Lynch's conviction for attempted murder on count 1*

Lynch contends that the evidence is insufficient to support his conviction for attempted murder. Specifically, Lynch argues that there is insufficient evidence that he was the person who shot Younger, or, if he did shoot her, that he harbored the specific intent to kill her. " ' "To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." ' [Citations.]" (*People v. Burney* (2009) 47 Cal.4th 203, 253.) " ' " 'If

the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' [Citations.]" (*Ibid*.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7.) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.' [Citation.]" (*People v. Smith* (2005) 37 Ca.4th 733, 739 (*Smith*).) "Express malice requires a showing that the assailant ' " 'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]" ' [Citations.]" (*Ibid*.)

"[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.]" (*Smith, supra*, 37 Cal.4th at p. 741.) " 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.]' " (*Ibid*.) The nature of an assault, the weapon used, the manner in which the weapon was used, as well as the actual consequences of the assault (including the nature, location, and seriousness of the wound) can provide evidence that a defendant harbored an intent to kill. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946 (*Lashley*).) " 'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*Smith*,

supra, 37 Cal.4th at p. 741.) " ' "The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*Ibid*.)

In arguing that there is insufficient evidence that Lynch was the person who shot Younger, Lynch presupposes that the statements that Younger made to various people after she was shot should not have been admitted in evidence at trial. However, we have already determined that the trial court properly admitted Younger's statements to Detective Snow and to Sergeant Fellows. These statements constitute substantial evidence to support the jury's finding that Lynch is the person who shot Younger.

There is also substantial evidence that Lynch intended to kill Younger. Lynch shot Younger from a distance of approximately 15 feet. Lynch aimed at Younger's upper chest and the bullet only narrowly missed her heart, piercing a major artery. Younger was severely injured as a result of being shot; her doctor testified that she would not have survived if she had not received immediate medical treatment, including surgery. Lynch's act of firing a gun at Younger from close range ' "in a manner that could have inflicted a mortal wound" ' (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690) is sufficient evidence to support an inference that he harbored the intent to kill.

We conclude that there is substantial evidence to support Lynch's conviction for attempted murder.

F. *There is substantial evidence that Lynch was involved in a domestic relationship with Younger*

Lynch contends that there is insufficient evidence to support his conviction on count 3, and the true findings on the enhancements under section 12022.7 associated with counts 1, 3, and 4. According to Lynch, there is insufficient evidence that he and Younger cohabitated or maintained a dating relationship at the time of the shooting within the meaning of section 273.5 or section 12022.7. We apply the same legal standards identified in part III.E., *ante*, to review Lynch's claims concerning the sufficiency of the evidence to support the jury's findings regarding the nature of his relationship with Younger.

1. *Cohabitation*

Lynch was convicted of violating section 273.5, which provides in pertinent part: "[A]ny person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition is guilty of a felony . . . ." The trial court instructed the jury with CALCRIM No. 840, and provided the jury with the following definition of "cohabitants":

> "The term 'cohabitants' means two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabitating include, but are not limited to: one, sexual relations between the parties while sharing the same residence; two, sharing of income or expenses; three, joint use or ownership of property; four, the parties holding themselves out as husband and wife; five, the continuity of the relationship; and six, the length of the relationship."

According to Lynch, the evidence establishes only that he and Younger "were having sexual relations and nothing more." He contends that "[t]here is no evidence of shared residency, sharing of income or expenses, joint property use, the parties holding themselves out as a domestic household, [or] a continuous or lengthy relationship."

"[C]ases addressing the cohabitation element of section 273.5 'have interpreted it broadly, refusing to impose any requirement of a "quasi-marital relationship." ' [Citation.] For purposes of section 273.5, the term 'cohabitant' 'requires something more than a platonic, rooming-house arrangement.' [Citation.] It refers to an unrelated couple 'living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.' [Citation.]" (*People v. Belton* (2008) 168 Cal.App.4th 432, 437- 438 (*Belton*).)

Younger testified that she and Lynch had been dating for almost eight years at the time of the shooting. Pradd also testified that Lynch and Younger were dating at the time of the offense. Both Younger and Pradd told police officers that Lynch stayed with Younger, off and on, in the apartment. Lynch acknowledged that he would occasionally have Younger pay his union dues for him. All of this constitutes evidence of a substantial relationship that had some permanence and sexual intimacy.

It appears that Younger and Lynch's living arrangements were somewhat transitory. At various places in the record, the parties are referred to as being homeless and/or as having stayed with relatives or friends for brief periods of time. However, "[a] permanent address is not necessary to establish cohabitation, as cohabitation can be found

even in 'unstable or transitory' living conditions. [Citation.]" (*Belton, supra,* 168 Cal.App.4th at p. 438.)

The fact that Lynch and Younger may, at times, have lived separately or with others does not preclude a finding that the two were cohabitants; in other words, simultaneous cohabitation may exist, and "a defendant who maintains substantial relationships with more than one person at a time may be subject to prosecution for infliction of injury on one of those persons with whom the defendant resides only intermittently." (*People v. Moore* (1996) 44 Cal.App.4th 1232, 1334-1335; see also *People v. Taylor* (2004) 118 Cal.App.4th 11, 19 [fact that victim and defendant "sometimes lived separately with other relatives" did not preclude a finding that they were cohabitants at the time of the charged offense].)

The testimony that Lynch stayed with Younger at Younger's parents' apartment, off and on, together with Younger's statement that she and Lynch had been involved in a romantic relationship for approximately eight years before the shooting incident, were sufficient to establish that Younger and Lynch were cohabitants within the meaning of section 273.5.

2. *Dating relationship*

The trial court instructed the jury with respect to the domestic violence enhancement allegations in pertinent part, as follows:

> "If you find the defendant guilty of the crimes charged in counts 1, 3, or 4, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant inflicted great bodily injury on Latoya Younger during the commission or attempted commission of that crime under circumstances involving

> domestic violence. . . . [¶] . . . [¶] Domestic violence means abuse committed against an adult who is a cohabitant or former cohabitant or person with whom the defendant is having or has had a dating relationship. . . .[¶] . . . [¶] The term 'dating relationship' means frequent intimate associations, primarily characterized by the expectation of affection or sexual involvement independent of financial consideration."

In addition to giving this instruction, the court repeated the instruction concerning the meaning of "cohabitants." Although Lynch and the People disagree as to whether there was sufficient evidence to support a finding that he and Younger had a dating relationship, we have already concluded that there was sufficient evidence to support the jury's finding that Lynch and Younger were cohabitants. Since the jury found that Lynch and Younger were cohabitants with respect to count 3, and that finding supports the jury's true finding on the domestic violence enhancements, there is sufficient evidence to support the jury's true finding on the domestic violence enhancement allegations. We therefore need not consider whether the evidence would also support a finding that the two were involved in a dating relationship.

G. *The trial court did not err in refusing to instruct the jury regarding attempted voluntary manslaughter*

Lynch contends that the trial court erred in denying his request to instruct the jury on the lesser included offense of attempted voluntary manslaughter.

During trial, the prosecutor offered proposed instructions that included an instruction on attempted voluntary manslaughter. Defense counsel seemed to agree that the court should instruct the jury on attempted voluntary manslaughter. The trial court commented on that proposed instruction, saying, "I don't see that any reasonable view of

the evidence would lead a jury to believe those [lesser included offenses, including attempted voluntary manslaughter] are appropriate."

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of the greater offense" [citation] but not the lesser.' [Citation]." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218, italics omitted.)

Attempted voluntary manslaughter is a lesser included offense of attempted murder. " '[A]n intentional killing is reduced to voluntary manslaughter if other evidence negates malice. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation [citation], or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. [Citation.] Only these circumstances negate malice when a defendant intends to kill. [Citation.]' [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).)

Lynch does not argue that there is evidence to support the existence of imperfect self-defense, but maintains that there is evidence that he may have acted upon sudden quarrel or heat of passion. According to Lynch, there was evidence that he and Younger had "quarreled over 'where [he] had been.' " Thus, he asserts, it was likely that the jury "would have found that [he] fired the shot 'in the heat of passion.' " We disagree.

" '[T]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago . . . , "this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances," because "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." [Citation.]' [Citations.]" (*Manriquez*, *supra*, 37 Cal.4th at p. 584.) " ' "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " [Citation.]' [Citation.]" (*Ibid*.)

" 'The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' " [Citation.]' [Citation.]" (*Manriquez*, *supra*, 37 Cal.4th at pp. 583-584.)

The record discloses no evidence that Lynch acted in the heat of passion, or that he was sufficiently provoked. Although Younger told Detective Snow that she and Lynch

had argued before he shot her, the evidence was that Younger was the one who was upset and wanted to know where Lynch had been. There was no evidence that the argument between Younger and Lynch was particularly heated, or that Younger in any way provoked Lynch to a degree that would have caused a reasonable person to act rashly or without deliberation or reflection.

The defense theory at trial was that Lynch was not the person who shot Younger, and that Lynch was in another state at the time of the shooting. There was thus no evidence that Lynch subjectively experienced the heat of passion or an extreme emotional reaction of the kind that would suggest that the shooting was the result of "sudden quarrel or heat of passion." Consequently, the trial court did not err in declining to instruct the jury on the lesser included offense of attempted involuntary manslaughter.

H. *The prosecutor fairly commented on Lynch's failure to call logical witnesses who could have corroborated his testimony*

Lynch argues that the prosecutor's comments to the jury regarding the fact that Lynch had not called certain logical witnesses to testify on his behalf constitute prosecutorial misconduct. This contention is without merit.

1. *Additional background*

During closing argument, the prosecutor stated,

> "And what [Lynch] got up and told us is: He wasn't here. They were having a party. There's all of these witnesses. Not only that, but the person that can exonerate him, he's related to. It's his wife. He's had contact with her as recently as this weekend. Knows where she is. Ladies and gentlemen, wild horses couldn't keep her off the stand--"

Defense counsel immediately objected, and the following colloquy occurred in response to the objection:

> "[Prosecutor]: Need to call logical witnesses.
>
> "The Court: Sustained.
>
> "[Prosecutor]: There is no burden for the defense to produce any evidence, but once he suggests that there's evidence out there that can exonerate him, you get to consider whether or not that evidence was presented to you.
>
> "[Defense Counsel]: Objection.
>
> "The Court: I'll see counsel at sidebar."

During the sidebar conference, which was reported, the court and attorneys had the following discussion:

> "[Defense Counsel]: Your Honor, that's improper. That's placing the burden on the defendant to present evidence.
>
> "The Court: Mr. [Prosecutor].
>
> "[Prosecutor]: Your Honor, it does not shift the burden of proof to comment on defense failure to put on any testimony or evidence. Commenting on the failure to call an alibi witness is also permissible. That is taken directly from the California Supreme Court in *People vs. Bradford*. [¶] The *Bradford* case involved a situation where the defendant didn't even testify. He didn't testify, and it was established during the –
>
> "The Court: You're talking about an alibi witness. But what you are arguing is that they should have called Latoya Younger; is that correct?
>
> "[Prosecutor]: Oh, I believe not just Latoya Younger, but I believe there's a failure to call all logical witnesses to support his statements. And it isn't limited to alibi witnesses. The failure to call logical witnesses is quite expansive. The only limitation--

> "The Court: It's an awfully dangerous area for you to be going into, Mr. Greco, and I just question why you'd even want to go down that road, especially given the fact that there's also a speedy-trial motion that is pending, and the court still has to decide whether there's been substantial prejudice to the defendant. And that is perhaps an argument the defense is going to be making, that because of the passage of six-plus years, that he doesn't remember where he was exactly that day, and that's why he doesn't call some witnesses to support his testimony. [¶] I really think you should leave it . . . at, 'Don't believe the witness. He's got felony convictions,' and move along."

The court then indicated a concern that "some clever appellate attorney may be arguing that [the prosecutor] indeed did shift the burden by making [the failure-to-call-logical-witnesses argument] to the jury." The prosecutor and court then further discussed the issue:

> "[Prosecutor]: I understand. I understand and appreciate the court's comment on this particular issue, th[e] failure to call logical witnesses. I have thought through that argument, and I have been careful -- in fact, I read very carefully, actually, these opinions. And the issue it's one of the reasons that I have prefaced my comments that I cannot shift the burden. But it is fair and appropriate for the People to comment on that failure to call logical witnesses.
>
> "The Court: Who are you suggesting that he should have called?
>
> "[Prosecutor]: Latoya Younger, Evonne Horne, his relatives who were aware of this party, individuals who could have testified to that. Where he's indicated that he came and visited at the hospital and there was documentation to support that, there's none of that documentation. Ms. Horne isn't here to say that he went and visited.
>
> "The Court: First of all, you never asked him about his wife's mother, Ms. Evonne Horne, Ms. Evonne Younger, Ms. Evonne Pradd. I think it's the same person. I don't think there was any cross examination on that point. So we don't know exactly why she wasn't here, and the court hasn't heard any evidence as to what attempts the People have made to call that person as a witness, either. [¶] So I differentiate Latoya Younger because there was testimony that she's

> been contacting him and things like that, versus everyone else in the world who you are suggesting that he should call.
>
> "[Prosecutor]: I did ask him if he had Evonne Pradd's telephone number, and he said yes, that is how he contacted Latoya Younger over this weekend. That was the cross. And I specifically asked him, 'Do you have an ability to contact her?'
>
> "The Court: Why should he have called Evonne Pradd? For what purpose? What relevance--
>
> "[Prosecutor]: To corroborate his -- he is now, for the first time, saying, 'I went and visited [Younger] at the hospital. I was there.'
>
> "The Court: With Evonne Pradd.
>
> "[Prosecutor]: With Evonne Pradd. And in addition to that, he has -- initially on his cross-examination, he had indicated he had left to go for Christmas in Jasper, Texas. Then when I asked, in my opinion, and it's my belief -- when . . . I asked him, did he spend Christmas there, he said Yes. He caught himself and then he said, 'I flew back. When I went to Winslow, I left before this shooting occurred. I found out about the shooting. I then came back, all via Greyhound.' [¶] If his alibi was ' I wasn't in San Diego County, I wasn't here,' we would have records from Greyhound that he had gone on this trip. If he had come back and visited, there would be records. And all of that --"

At this point, defense counsel indicated that his problem was that he would have to tell the jury everything that the defense had done to try to prove Lynch's alibi. The court then said to the prosecutor: "I, once again, have to reiterate my feeling, is that you are treading on thin ice, Mr. Greco, when you go down this area, you know. I think whether he -- I mean, certainly, according to his testimony, it's undisputed that he's been in contact with Latoya Younger. And it seems pretty obvious that he should have called her, I suppose. [¶] But as to other alibi witnesses and producing other records, I think

your getting further and further down that path is going to get you into trouble. So I really caution against that at this point."

When the prosecutor resumed his closing argument, he stated:

> "The defendant was on the stand, in this seat, and looked at you and gave you an explanation. He told you he was on a Greyhound bus . . . And he had a friend who paid for that Southwest Airlines ticket.
>
> "And he told you that he went and visited and signed a document at the hospital with Evonne Pradd Horne, Latoya's mother. He told you all of that from this witness stand. And you heard he called Evonne Pradd, Evonne Horne. He had talked to Latoya Younger. He knew the name of his friend and where he lived. None of those people, not one of them, has come here and corroborated what he told you.
>
> "Now that doesn't, as I said before, shift the burden. He doesn't have to prove that he is innocent. But the fact that he doesn't produce that relevant evidence is fair for you to consider. You can consider that fact."

Finally, during rebuttal, the prosecutor made the following statement, as to which the court overruled defense counsel's objection:

> "Now there's been a suggestion that this is a high-crime neighborhood, that this is – as, I suppose, a possible explanation for somebody coming and shooting her. And it's also been suggested that she framed or decided to point the finger at the defendant because he might even be out of town. What better alibi? What better – if he's out of town, he has an alibi. Just bring in somebody that says, 'I'm out of town.' "

2. *Relevant law*

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial

fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, . . . when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*).)

A prosecutor may comment on a defendant's failure to call logical witnesses. (*People v. Chatman* (2006) 38 Cal.4th 344, 407; see also *People v. Wash* (1993) 6 Cal.4th 215, 263.) "When the defendant has taken the stand . . . and offered a[] . . . defense in which he identifies other persons who could support his testimony, and those witnesses are available and subject to subpoena, there should be no question but that comment [on the failure to call those witnesses] is appropriate and permissible." (*People v. Ford* (1988) 45 Cal.3d 431, 447.) However, it is improper for a prosecutor to comment on a defendant's failure to call a logical witness whose unavailability to testify has been established. (See *id*., at pp. 443-448 [witness himself must assert the right against self-incrimination in order to be considered " 'unavailable;' " counsel may stipulate to unavailability, or defendant "may satisfy the court that the witness cannot be called"].) A defendant who offers testimony that may be corroborated by a witness bears the burden of "establishing that the corroborating witnesses are actually 'unavailable.' " (*Id*. at p. 444.)

3. *Analysis*

Lynch acknowledges that the law permits the prosecution to comment on a defendant's failure to call logical witnesses. However, he contends that "when the prosecutor makes more than a simple comment on the failure to produce logical, competent evidence or when the comment is unfair, because the defendant was not in a position to produce the witness, then the comment may constitute reversible error." Lynch maintains that there are three reasons why the prosecutor's conduct "constituted more than a mere comment on the defense failure to produce evidence." First, he complains, the prosecutor did not "heed the numerous admonishment[s] of the trial judge [to] not comment further in this area." Second, he contends that "the remark was improper because of the age of the case." And third, Lynch asserts that the prosecutor's comment regarding Lynch's failure to produce Younger as a witness at trial was unfair because "there was no evidence that appellant encouraged her absence from the trial or was in a position that he could have subpoenaed her." None of these arguments is persuasive.

It is clear that the prosecutor's comments were directed toward Lynch's failure to call logical witnesses or to present other material evidence that could have supported his testimony about his whereabouts at the time of the shooting. Specifically, the prosecutor commented that Lynch had not called Younger, who would have known whether Lynch was in the apartment on the day of the shooting. Lynch admitted that he had been in contact with Younger just days before he testified at trial. Thus, although the prosecutor had established, prior to trial, that he had been unable to locate Younger, and the court

deemed her an unavailable witness for purposes of the prosecution's request to admit Younger's preliminary hearing testimony (see Evid. Code, § 240, subd. (5)), it was not established that Younger was unavailable to the defense.[15] Lynch's admission that he had been in contact with Younger either just prior to, or during, the trial opened up the possibility that Younger was purposely making herself unavailable to the prosecution in an effort assist the defense.[16] Lynch also acknowledged that he had Evonne Pradd's telephone number in his possession, and that he had called her in order to get in touch with Younger in the days just prior to trial. Evonne Pradd would have been a logical

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15 The prosecution established that Younger was " 'unavailable as a witness,' " thus allowing the prosecution to introduce Younger's preliminary hearing testimony at trial. (Evid. Code, § 240, subd. (a)(5).) The prosecution was required to make that showing because it was "the proponent of [Younger's] statement." (*Ibid*.) When Lynch took the stand and identified Younger as someone who could support his testimony, she became a logical witness for the defense, and Lynch was the theoretical "proponent" of her corroborating statements. In order to prevent the prosecution from commenting on his failure to call this logical witness, it was incumbent on Lynch to demonstrate to the court that Younger was unavailable to provide the exculpatory testimony. "The prosecutor cannot know, much less prove whether a witness would testify if asked to do so by the defendant. It is the defendant whose testimony has created the situation that makes the person a logical exculpatory witness. There is nothing unfair in requiring the defendant to bear the burden of establishing that the reason the witness was not called is that he is 'unavailable' . . . ." (*Ford*, *supra*, 45 Cal.3d at p. 443.)

16 In responding to Lynch's posttrial motion for a new trial and revisiting its previous evidentiary rulings, the trial court noted that it was the court's opinion, after hearing Younger testify in support of Lynch's posttrial motion, that Younger had "intentionally absent[ed] herself from the jurisdiction of the court and from service of process," and that she and Lynch were attempting to "blame the attorney for her non-appearance at trial." The court also noted that "[i]t was clear that [Younger] . . . was visiting her husband regularly in the county jail right up until the trial." The court stated, "It was miraculous that Ms. Lynch showed up [at] the very next hearing right after the trial was over. It's clear to the court that essentially the defendant and his wife, the victim in this case, were conspiring, quite frankly, and that became even more clear when Ms. Lynch, Latoya Younger Lynch, testified during the course of the motion for the new trial."

witness for Lynch to call because she could have corroborated Lynch's testimony concerning the timing of his return to San Diego after his trip and his claim that upon his return, he immediately went to see Younger in the hospital. Further, Lynch's friend, who Lynch claimed had purchased an airline ticket for Lynch to fly to Phoenix after he had returned to San Diego to see Younger in the hospital, would also have been a logical defense witness. Lynch made no attempt to establish that he had been unable to contact that friend or that the friend was unavailable to testify.

The prosecutor made it clear to the jury that Lynch had no burden to prove his innocence, and the jury was properly instructed that Lynch was presumed innocent and that the burden was on the People to prove each of the charges beyond a reasonable doubt. The prosecutor's comments constitute fair and proper comment on Lynch's failure to call witnesses who could have corroborated the version of events that he gave during his testimony at trial.

Even if the prosecutor should not have commented on Lynch's failure to call Younger as a witness because the court had determined that she was "unavailable" (on the basis of the prosecution's unsuccessful attempts to reach Younger prior to trial), Lynch cannot establish that he suffered prejudice from these comments. (See *People v. Rowland* (1992) 4 Cal.4th 238, 274 [showing of prejudice required to establish prosecutorial misconduct].) It is not likely that the prosecutor's comments concerning Younger's absence substantially misled the jury with respect to the state's burden of proof. Again, the jury was properly instructed on the law, and we presume that the jury

followed the court's instructions. (See *Morales*, *supra*, 25 Cal.4th at 47 [jury is presumed to rely on court's instructions, not counsel's arguments].)

IV.

DISPOSITION

Lynch's conviction for attempted murder is affirmed. The judgment with respect to counts 2 through 6 is reversed, and the matter is remanded for a determination as to whether the prosecution of counts 2 through 6 was time-barred. Following such determination, the court shall reinstate the judgment of conviction as to each timely count.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.